#L-605 1/4/85

Memorandum 85-9

Subject: Study L-605 - Distribution Under a Will or Trust

The Commission's Tentative Recommendation Relating to Distribution Under a Will or Trust was distributed to approximately 350 persons and organizations. A copy of the tentative recommendation is attached. Only seven comments were received.

GENERAL APPROVAL OF TENTATIVE RECOMMENDATION

Six of the seven comments approved the substance of the tentative recommendation, but some comments suggested revisions in the tentative recommendation or changes in existing law:

(1) The Executive Committee of the Estate Planning, Trust and Probate Law Section of the State Bar supports the tentative recommendation and proposes no changes in it. Exhibit 7 attached.

(2) The Probate and Estate Planning Section, Kern County Bar Association, supports the tentative recommendation (except for the provisions relating to "per capita," which are discussed later in this memorandum). Exhibit 1.

(3) Elliot D. Pearl, Sacramento, is in favor of the concept of the recommendation but finds the definitions "more confusing than clarifying." Exhibit 2.

(4) Jack E. Cooper, San Diego, approves the recommendation but strongly urges the repeal of the ancestral property doctrine. Exhibit 3.

(5) Jerome Sapiro, San Francisco, believes that the four statutory choices proposed in the tentative recommendation are satisfactory if some significant changes are made in various provisions of existing law. Exhibit 4. The suggested changes are discussed later in this memorandum.

One of the persons who submitted comments relevant to the tentative recommendation is our consultant, Professor Gail Boreman Bird. Exhibit 5. She agrees with the suggestion earlier received from our consultant Professor Dukeminier. They believe that the original AB 25 version of Section 240 should be restored and that the alternative distribution schemes proposed in the tentative recommendation should not be enacted. However, this suggestion is one that the Commission considered when it

reviewed the reaction of the probate lawyers to AB 25 and proposed the revision of Section 240 in AB 2290 (the cleanup bill on AB 25). As the result of the enactment of the revisions made in AB 2290, we now have Section 240 in a form that is generally acceptable. The staff does not consider the consultant's suggestion to be a practical alternative to the provisions of the tentative recommendation.

SPECIFIC SUGGESTED REVISIONS IN TENTATIVE RECOMMENDATION

Intestate Distribution Scheme Under Section 240

The tentative recommendation does not change the substance of the intestate distribution scheme provided by existing Section 240. However, Jerome Sapiro (Exhibit 4) proposes that the distribution scheme provided by that section as revised by AB 2290 be changed. (Mr. Sapiro was the moving force behind the proposal to repeal or defer the operative date of AB 25.)

Mr. Sapiro suggested revision can be best understood by considering the following case: Assume that a decedent dies intestate with no surviving spouse. The decedent had three children, all of whom died before the decedent. Child 1 died without children. Child 2 died leaving three children, all of whom survived the decedent. Child 3 died leaving one child who survived the decedent.

Under Section 240, the division of the decedent's estate is made at the first generation having a living member, that being the generation of grandchildren. Hence, each grandchild receives an equal share or 1/4 of the decedent's estate. This is the scheme of the Uniform Probate Code and surveys by the American Bar Association and others indicate that persons would prefer that each grandchild receive an equal share if all the parents are dead.

Mr. Sapiro prefers a distribution scheme that divides the property at the children's generation, even though none of the children survived the decedent, each grandchild taking a share based on the share of his or her deceased parent. Applying this scheme to the example given, the property would be divided in half, one-half going to the children of Child 2 and one-half going to the children of Child 3. Hence, one of the grandchildren would receive one-half of the estate and the other three grandchildren each would receive one-sixth of the estate.

On numerous occasions the Commission has discussed the distribution scheme provided under Section 240. Some revisions were made in Section

240 to deal with the concerns of the probate lawyers as to the application of the section to a will or trust. The section now appears to be generally accepted. The staff does not believe that the need for further revision of Section 240 is demonstrated by the letter from Mr. Sapiro. Mr. Sapiro proposes a change in existing law under Section 240. The proposal has nothing to do with the changes proposed by the tentative recommendation. The same is true for the changes he suggests in Section 6147, 6402, and 6402.5. All of the changes he suggests in these sections would be changes in existing law.

Section 250 (pages 4-5)

The Probate and Estate Planning Section, Kern County Bar Association (Exhibit 1) objects to paragraph (1) of subdivision (b) of Section 250. Section 250 provides that ". . . when a will or trust that expresses no contrary intention provides for issue or descendants to take without specifying the manner, the property shall be distributed in the manner provided in Section 240." The provision to which the objection is made reads:

> (b) The use of the following words, without more, as applied to issue or descendants is not an expression of contrary intention:
> (1) "Per capita" when living members of the designated class are not all of the same generation.

For example, assume that a testamentary trust provides that when the trust terminates, the trust estate goes to "the descendants of the testator per capita." At the time the trust terminates, one of the testator's children is alive and has five children alive, and the other two of the testator's children are alive but have no children. Under the tentative recommendation, each of the children would take a 1/3 share; the grandchildren would take nothing. Under the interpretation suggested by the Kern County Bar Section, the property apparently would be divided into 8 shares, and each of the three children and each of the five grandchildren would take one share. This is the result the language included in the tentative recommendation seeks to avoid. The staff recommends that this provision be retained. We suggest, however, that additional language taken in part from the Comment to Section 253 of the tentative recommendation be added to the Comment to Section 250, so that the last paragraph of the Comment to Section 250 would be revised to read:

Subdivision (b) provides that certain language is not an expression of a contrary intention sufficient to negate application of Section 250. The wording specified in subdivision (b) is not a clear expression of a contrary intent. ~~See also the Comment to Section 253.~~ For example, if property in a testamentary trust is to be distributed when the trust terminates to "the descendants of the testator per capita" and at the time of distribution the testator's three children survive and one of the surviving children has five children, each of the three surviving children takes a one-third share; the five grandchildren of the testator take nothing since their parent survives. In the context of a multi-generational class, it is reasonable to assume that the use of the term "per capita" is not intended to provide a share for a class member whose parent or other ancestor is still living and takes a share, although the drafter of the instrument may provide for such a result by appropriately clear language.

Section 253 (pages 8-9)

The Probate and Estate Planning Section, Kern County Bar Association (Exhibit 1) found the tentative recommendation desirable and satisfactory except for the definition of "per capita." Also, Elliot D. Pearl (Exhibit 2) found the definitions in the tentative recommendation more confusing than clarifying. The Kern County Bar Association Section does not object to the definition of "per capita at the same generation" in Section 252, but they fear that other provisions of the tentative recommendation will take away the flexibility of using the term "per capita."

The definition of "per capita" in Section 253 serves no useful purpose since the definition provided is the one that would otherwise apply absent a contrary intention expressed in the will or trust. But the definition does increase the complexity of the statute and has caused confusion on the part of two of the persons or organizations submitting comments. The staff recommends that Section 253 be deleted from the tentative recommendation.

Ancestral Property Doctrine

The section of AB 25 that continued in part the ancestral property doctrine--Section 6402.5--was included in the tentative recommendation. No substantive change was proposed in the section; only a technical revision was made. However, two of the persons who commented on the tentative recommendation commented on the substance of this section.

Jack E. Cooper (Exhibit 3) approved the tentative recommendation but commented:

> Your discussion [in a November 1983 publication] of the costs and complexities injected into the probate administration by the ancestral property doctrine was accurate. How and why Section 6402.5 was passed by the legislature to take effect January 1, 1985, is unknown to me? I urge you to use all the powers of persuasion at your disposal to repeal that section. We do not need it!

Jerome Sapiro notes that the law concerning the application of the ancestral property law is unclear:

> § 6402.5 requires some clarifying changes. What about the traceable proceeds and increment of and from the one-half share of community real property? Some provision either ruling in or out the inclusion of the same should be added.

You will recall that at a recent meeting the Commission considered whether Section 6402.5 should be repealed or revised. The Commission decided not to propose the repeal of the section at this time. The Commission also decided not to devote at this time the time and resources it would take to make the section workable. The Commission decided to review at a future time whether the section should be revised or repealed. The staff recommends that no effort be made at this time to repeal or revise Section 6402.5. A proposal to repeal the section would be very controversial; and an effort to perfect the section would require substantial staff and Commission resources that the staff believes must be devoted to the drafting of the new Probate Code.

Probate Code § 6402 (pages 9-11)

Mr. Sapiro (Exhibit 4) has noted a typographical error in the version of Section 6402 set out in the tentative recommendation. As he notes, the word "issue" should be substituted for "spouse" so the correct version of the existing section will be set out.

APPROVAL FOR PRINTING AND SUBMISSION TO LEGISLATURE

This tentative recommendation was generally approved by the persons who submitted comments. The fact that more comments were not received indicates that persons to whom it was sent did not find it objectionable. Accordingly, with such revisions as the Commission decides to make, the staff recommends that the tentative recommendation be approved for printing as a recommendation and that the proposed legislation be introduced in the 1985 legislature.

Respectfully submitted,

John H. DeMoully
Executive Secretary

Memo 85-9

EXHIBIT 1

LAW OFFICES

BYRUM, KIMBALL, CARRICK, KOONTZ & CREAR

A PROFESSIONAL CORPORATION

1515-20TH STREET

BAKERSFIELD, CALIFORNIA 93301

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December 17, 1984

FILE NO.

Mr. John H. DeMoully, Executive Secretary
CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303

Dear Mr. DeMoully:

This letter contains the comments of the Probate and Estate Planning Section of the Kern County Bar Association on the five specific recommendations you sent to me. Please add the following persons to your mailing list who would like to review and comment on future recommendations:

Thomas A. Tutton, Esq.
DEADRICH, BATES & TUTTON
1122 Truxtun Avenue
Bakersfield, CA 93301

James Hulsy, Esq.
HULSY & HULSY LAW OFFICES
412 Truxtun Avenue
Bakersfield, CA 93301

Vernon Kalshan, Esq.
651 "H" Street
Bakersfield, CA 93301

Barry L. McCown, Esq.
5100 California Avenue
Bakersfield, CA 93309

The Probate and Estate Planning Section of the Kern County Bar Association is willing to review and comment on preliminary drafts of the new Probate Code and would like to receive copies of the materials the Commission distributes. We request that the materials be sent out more than one month before the comment period ends, if possible, to give us more time to study the recommendations.

Our committee which reviewed the five recommendations had no objection to the recommendations on transfer without probate of title to certain property registered by the state and effect of adoption or out of wedlock birth on rights at death. We have specific comments on the other three recommendations.

Distribution Under a Will or Trust

The committee liked the idea of clear phrases to identify distribution schemes. All of the definitions are satisfactory except "per capita." The Commission has made it impossible to use "per capita" in the pure sense of the phrase, i.e., one share to each member of the designated class, whether of the same generation or not. We have always understood the term "per capita" to mean what I have described above as being in the pure sense. No diagram was was given for "per capita" which made it more difficult to understand. We feel that the definition of "per capita" should remain as we have always understood it and not have it redefined so it is applicable only in very narrow class designations. We would like to have the term mean what I have described above so we can use it when it is appropriate rather than having to define the distribution scheme in the instrument. We do not feel that the Commission's definition of "per capita" will be very useful because it is so narrow and will cause testators to fall within section 250 when this was not their intent at all. For the same reason, we would not include section 250(b)(1).

We did appreciate the removal of "by right of representation" from the intestate succession provision and the proper definition of the phrase in section 251. This is a good correction of the last Probate Code Reform. We do not feel that the meaning of terms like "by right of representation" should be changed from the way they are in common use. It is for that reason that we object to your change in the meaning of "per capita." If the Commission wants to invent a phrase "per capita in the same generation" to describe the content of section 253, this is okay. But do not take away the flexibility of using the term "per capita" as presently understood.

We hope that our comments have been of some use to you.

PROBATE AND ESTATE PLANNING
SECTION, KERN COUNTY BAR
ASSOCIATION

By: Hal M. Koontz
HAL M. KOONTZ, President

HMK:alm

LAW OFFICES OF
ELLIOT D. PEARL
A PROFESSIONAL CORPORATION
555 UNIVERSITY AVENUE, SUITE 290
SACRAMENTO, CALIFORNIA 95825
(916) 927-7728

December 6, 1984

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303

Attn: John H. DeMoully

Dear Mr. DeMoully:

I am pleased to have been nominated by Mr. Frantz to serve on the committee and to review the tentative proposals of the Law Revision Commission relating to probate law. I have reviewed the same and have the following general comments which perhaps will be of some assistance. Should specific recommendations be desired, I will be happy to meet with other committee members or with the Commission itself to discuss these.

3. The proposals regarding distributions under will or trust and in effect attempting to identify, once and for all, the differences between the "right of representation" and "per stirpe" and is very well meaning; however, in reading through the proposals, it appears that these are more confusing then clarifying and, in my opinion, at least, the statute needs to be cleaned up somewhat. There has always been difficulty in explaining these concepts to clients and now it would seem that it would be even more difficult. Diagrams, such as shown in the recommendations, simply do not fill the need, and it is suggested that the issues could be more concise and, at the same time, more explanatory as to what the terms mean. Incidentally it is my belief that attorneys themselves use the term "right of representation" without a full realization of what it means and there is a definite need for clarification of these terms.

Thank you for having allowed us to review these very important proposals; if further review is desirable or if the commission would like me to appear or consult directly with it, I would be happy to do so.

Respectfully submitted,

ELLIOT D. PEARL

EDP:ap

cc: Benjamin Frantz

EXHIBIT 3

JACK E. COOPER
ATTORNEY AT LAW
225 BROADWAY, SUITE 1500
SAN DIEGO, CALIFORNIA 92101
(619) 232-4525

November 29, 1984

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303

Re: Tentaive Recommendation - Distribution Under A Will or Trust

Gentlemen:

The above-referenced recommendation includes a technical amendment to section 6402.5 of the Probate Code. I for one object to the incorporation of that section into our Probate Code. My objection is not directed to the amendment, but to the section.

I was of the opinion that your tentative recommendation relating to Wills And Intestate Succession of November 1982 was sound. Your discussion of the costs and complexities injected into the probate administration by the ancestral property doctrine was accurate. How or why section 6402.5 was passed by the legislature to take effect January 1, 1985, is unknown to me. I urge you to use all the powers of persuasion at your disposal to repeal that section. We do not need it!

With regard to the balance of the tentative recommendation: It has been my experience that virtually all of my clients desire distribution by right of representation, at this time it would be my intent to continue to use the phrase "by right of representation" in drafting wills. The proposed legislation does provide a greater degree of certainty as to the meaning of the phrase. In those instances where the testator does desire some other type of distribution, the proposal will make it easier to set forth the client's wishes with certainty.

Very truly yours,

Jack E. Cooper

Jack E. Cooper

EXHIBIT 4

LAW OFFICES
JEROME SAPIRO
100 BUSH STREET
SAN FRANCISCO 94104
(415) 362-7807

November 26, 1984

California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA, 94306
Thru: John DeMoully, Executive Secretary

Re: Comments on Proposed Recommendation #H-601, Proposed Tentative Recommendations #L-605 and #L-500, and Discussion Draft #1-659

Dear Mr. DeMoully:

Herewith for the California Law Revision Commission are my comments and recommendations concerning the above mentioned proposals, recently received from your office.

TENTATIVE RECOMMENDATION RE DISTRIBUTION UNDER A WILL OR TRUST (11/8/84, #L-605)

The four (4) statutory choices, if amended to meet the following comments, appear satisfactory. They may tend to educate attorneys and Courts concerning the areas covered.

I do oppose the proposed amendments to Probate Code §240.

The example at page 5 does not carry right of representation down to to GGGC-1, GGGC-2 and GGGC-3. If it did, GGGC-3 should receive 1/8 and GGGC-1 and GGGC-2 1/16 each. This result would be proper in view of the old section and the intention of many members of the State Bar to retain or have the right of representation even in the area of intestate succession. On the other hand, in the case of the deaths of GGC-2 and GGC-3 in the example, as to their surviving issue you have given a per capita effect.

I prefer by right of representation where some members of a prior generation survive (i.e. GGC-4 in the example).

Contrary to your repeated statements "This change is non-substantive", by right of representation does differ substantially from Section 240 as proposed and applied in the proposal. The following changes should be made:

Probate Code § 6147, Anti-Lapse (Sec. 6, page 9):

§240 should be changedto §251;

Probate Code §6402, Intestate Share of Heirs other than Surviving Spouse (Sec. 7, page 9 et seq.)

(a) Change §240 to §251;

(c), (d) and (e) Same change

NOTE: (b) has an error, - "spouse" should be deleted and "issue" inserted at page 10.

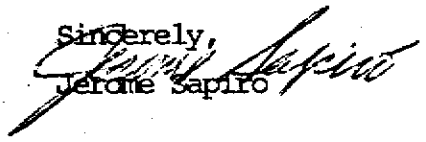
Probate Code §6402.5, Special Rule for Portion of decedent's estate attributable to the decedent's deceased spouse (Section 8, page 11) should have the same change in (1) and (3) - §251 rather than §240.

NOTE: §6402.5 requires some clarifying changes. What about the traceable proceeds and increment of and from the one-half shares of community real property? Some provisions either ruling in or out the inclusion of same should be added.

Thank you for this opportunity to participate.

I hope that my suggestions will help to make better law for our people and State.

Sincerely,



Jerome Sapiro

JS:mes
cc to Kenneth M. Klug, Chair
Estate Planning, Trust & Probate Law Section

EXHIBIT 5

Study L-605

UNIVERSITY OF CALIFORNIA

HASTINGS COLLEGE OF THE LAW

September 20, 1984

GAIL BOREMAN BIRD
Associate Professor of Law

John H. DeMoully
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto CA 94303-4739

Dear John:

Enclosed is a copy of the trust termination study requested under my contract with the Commission. If there are additional points that need to be considered, please let me know. I would like to submit the article to the Hastings Law Journal for possible publication. Would this be acceptable to the Commission?

Thank you for the invitation to the dinner honoring the Commissioners. Due to my teaching commitments, I will probably be unable to attend the September meeting, but I do appreciate being included in the invitation.

I would like to comment briefly on one of the issues scheduled for the September meeting - the definition of representation (Memorandum 84-65). I think that including three different definitions of representation or per stirpes in the Probate Code adds unnecessary complexity and technical minutiae to the Code. I wholeheartedly agree with Professor Dukeminier's statement in his letter of July 26, 1984 that we should have one definition, applicable across the board to intestate succession, wills and trusts. I personally prefer the existing definition in Section 240, but see merit in the Waggoner proposal. Either one would suffice. If a particular testator or trustor desires a different distribution, his will or trust can be drafted to carry out his specific intentions.

Thank you for your assistance.

Very truly yours,

Gail

Gail Boreman Bird

Enclosures as stated

200 McALLISTER STREET SAN FRANCISCO, CALIFORNIA 94102-4978 • (415) 557-1320

HENRY ANGERBAUER, CPA
4401 WILLOW GLEN CT.
CONCORD, CA 94521

11/25/84

Law Revision Commission:

Gentlemen:

I have read your recommendation relating to Distribution Under a Will or Trust and I agree with your proposals and conclusions. Please implement your recommendations by proposing them to the 1985 legislature.

Sincerely

H

EXHIBIT 7

ESTATE PLANNING, TRUST AND PROBATE LAW SECTION
THE STATE BAR OF CALIFORNIA

555 FRANKLIN STREET
SAN FRANCISCO, CA 94102-4498
(415) 561-8200

December 19, 1984

Mr. John DeMoully
Executive Secretary
California Law Revision Commission
4000 Middlefield Road
Suite D-2
Palo Alto, California 94303

Re: Memorandum 85-5, 85-9, 85-11, 85-13 and 85-7

Dear John:

The Executive Committee of the State Planning, Trust and Probate Law Section, State Bar of California, has considered the following memoranda. Comments are set forth as follows:

2. Memorandum 85-9 - Distribution Under the Will or Trust. Our Committee supports this Recommendation regarding distribution under the Will or Trust.

Looking forward to seeing you in Sacramento on the 17 to 19th of January.

Very truly yours,

James V. Quillinan
Attorney at Law

JVQ/agc

cc: Ken Klug
Ted Cranston
Charles A. Collier, Jr.

#L-605 11/8/84

STATE OF CALIFORNIA

CALIFORNIA LAW

REVISION COMMISSION

TENTATIVE RECOMMENDATION

relating to

DISTRIBUTION UNDER A WILL OR TRUST

November 1984

Important Note: This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be considered when the Commission determines what recommendation, if any, it will make to the California Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you object to the tentative recommendation or that you believe that it needs to be revised. COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE SENT TO THE COMMISSION NOT LATER THAN DECEMBER 15, 1984.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303

TENTATIVE RECOMMENDATION

relating to

DISTRIBUTION UNDER A WILL OR TRUST

Wills and trusts often provide that if a beneficiary is deceased when distribution is made the property shall go to descendants of the deceased beneficiary.[1] How the property is to be divided and apportioned among descendants depends on the language of the instrument, but some of the terms in present use are ambiguous and lead to confusion and possible litigation over the proper interpretation of the instrument.[2] It would be useful to persons drafting wills and trusts to have statutory alternatives for distributing the property among descendants that could be selected by a simple reference in the instrument to the desired statutory alternative. This would bring clarity and certainty to such provisions and would encourage those drafting wills and trusts to consider the more popular alternatives and to discuss them with clients.

The Commission recommends that four statutory choices be provided:

(1) A pure stirpital distribution pattern.[3] Under this distribution pattern, the initial division of the property is made at the generation of the children of the deceased beneficiary, whether or not any children are living. Grandchildren and more remote generations divide the share of their deceased parent.

(2) The distribution pattern for intestate succession.[4] Under this distribution pattern, the initial division of the property is made at

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1. See, e.g., Johnston, Outright Bequests and Devises, in California Will Drafting § 11.38, at 371-72, § 11.42, at 374 (Cal. Cont. Ed. Bar 1965); Drafting California Revocable Inter Vivos Trusts § 5.44, at 172 (Cal. Cont. Ed. Bar 1972); Drafting California Irrevocable Inter Vivos Trusts, at 377 (Cal. Cont. Ed. Bar 1973).

2. For example, a will or trust may call for descendants to take in the deceased beneficiary's place "by right of representation" or "per stirpes." It is not clear whether this means a pure stirpital distribution pattern or refers to the intestate pattern. Halbach, Whither Distribution by Representation?, in 1984 CEB Estate Planning & California Probate Reporter 103.

3. An example of distribution under a pure stirpital distribution pattern may be found in the Comment to proposed Probate Code Section 251 in this recommendation.

4. See Prob. Code § 240. An example of distribution under Section 240 may be found in the Comment to proposed Probate Code Section 250 in this recommendation.

the first generation of descendants having at least one living member. The number of shares is equal to the number of living members of that generation plus the number of deceased members who leave surviving descendants. Each living member of that generation takes one share. More remote generations divide the share of their deceased parent, except that if a descending share reaches a generation all of whose members in that line are deceased, that share is divided in the same manner at the next generation having at least one living member.

(3) The distribution pattern called "per capita at each generation."[5] Under this distribution pattern, the initial division of the property is made at the first generation having at least one living member. The number of shares is equal to the number of living members of that generation plus the number of deceased members who leave surviving descendants. Each living member of that generation takes one share. The shares of deceased members of that generation are aggregated into a lump sum. The lump sum descends to the next generation of descendants of the deceased ancestors which has at least one living member. There the process is repeated, with each living member taking one share and the shares of deceased members being aggregated and descending further.

(4) The distribution pattern called "per capita."[6] Under this distribution pattern, each living member of the designated class takes one share, equal to every other living member of the designated class. This statutory choice should be available only when all members of the designated class are in the same generation. When the members of the designated class are from several generations, there is a likelihood that the drafter of the will or trust did not intend members of more remote generations to take a share without regard to whether the member's parent or other ancestor is living or dead.

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5. Waggoner, A Proposed Alternative to the Uniform Probate Code's System for Intestate Distribution Among Descendants, 66 Nw. U.L. Rev. 626, 630-31 (1971). An example of distribution under a per-capita-at-each-generation pattern may be found in the Comment to proposed Probate Code Section 252 in this recommendation.

6. The "per capita" distribution system is not representation. Each member of the designated class takes in his or her own right, not by virtue of taking in place of a deceased ancestor. One may take per capita even when the person's parent is also living. See generally 80 Am. Jur.2d Wills § 1450, at 522-23 (1975); 4 W. Bowe & D. Parker, Page on the Law of Wills § 36.6, at 555 (1961).

The Commission's recommendation would be effectuated by enactment of the following measure:

An act to amend Section 1389.4 of the Civil Code, to amend Sections 240, 6147, 6402, and 6402.5 of, to amend the heading of Part 6 (commencing with Section 240) of Division 2 of, to add a heading immediately preceding Section 240 of, and to add Chapter 2 (commencing with Section 250) to Part 6 of Division 2 of, the Probate Code, relating to probate law and procedure.

The people of the State of California do enact as follows:

992/942

Civil Code § 1389.4 (technical amendment). Power of appointment

SECTION 1. Section 1389.4 of the Civil Code is amended to read:

1389.4. (a) Except as provided in subdivision (b), if an appointment by will or by instrument effective only at the death of the donee is ineffective because of the death of an appointee before the appointment becomes effective and the appointee leaves issue surviving the donee, the surviving issue of such appointee shall take the appointed property in the same manner as the appointee would have taken had the appointee survived the donee except that the property shall pass only to persons who are permissible appointees, including those permitted under Section 1389.5. If the surviving issue are all of the same degree of kinship to the deceased appointee they take equally, but if of unequal degree then those of more remote degree take ~~by representation as~~ in the manner provided in Section 240 of the Probate Code.

(b) This section does not apply if either the donor or donee manifests an intent that some other disposition of the appointive property shall be made.

Comment. Section 1389.5 is amended to delete the reference to taking "by representation." This change is nonsubstantive.

404/675

Probate Code--heading for Part 6 (commencing with Section 240) of Division 2 (amended)

SEC. 2. The heading of Part 6 (commencing with Section 240) of Division 2 of the Probate Code is amended to read:

PART 6. ~~DIVISION BY REPRESENTATION~~ DISTRIBUTION AMONG HEIRS OR BENEFICIARIES

Probate Code--heading for Chapter 1 (commencing with Section 240) of Part 6 of Division 2 (added)

SEC. 3. A heading is added immediately preceding Section 240 of the Probate Code, to read:

CHAPTER 1. INTESTATE DISTRIBUTION SYSTEM

Probate Code § 240 (amended). Distribution according to intestate distribution system

SEC. 4. Section 240 of the Probate Code is amended to read:

240. If ~~representation is called for by this code, or if a will or trust that expresses no contrary intention provides for issue or descendants to take without specifying the manner~~ a statute calls for property to be distributed or taken in the manner provided in this section, the property shall be divided into as many equal shares as there are living members of the nearest generation of issue then living and deceased members of that generation who leave issue then living, each living member of the nearest generation of issue then living receiving one share and the share of each deceased member of that generation who leaves issue then living being divided in the same manner among his or her then living issue. ~~If a will or trust calls for distribution per stirpes or by right of representation, these terms shall be construed under the law that applied prior to January 1, 1985.~~

Comment. Section 240 is amended to delete the language relating to construction of a will or trust. The language deleted from the first sentence of Section 240 is continued in Section 250. The former second sentence which has been deleted from Section 240 is continued in Section 251.

The former reference to "representation" is also deleted from Section 240 to avoid confusion with the definition of the term when used in a will or trust. See Section 251.

For sections applying Section 240, see Civil Code § 1389.4; Prob. Code §§ 6402, 6402.5. For an example of distribution under Section 240, see the Comment to Section 250.

21998

Probate Code §§ 250-253 (added). Distribution under a will or trust

SEC. 5. Chapter 2 (commencing with Section 250) is added to Part 6 of Division 2 of the Probate Code, to read:

CHAPTER 2. DISTRIBUTION UNDER A WILL OR TRUST

§ 250. Distribution according to intestate distribution system

250. (a) When a will or trust calls for property to be distributed or taken "in the manner provided in Section 240 of the Probate Code,"

or when a will or trust that expresses no contrary intention provides for issue or descendants to take without specifying the manner, the property to be distributed shall be distributed in the manner provided in Section 240.

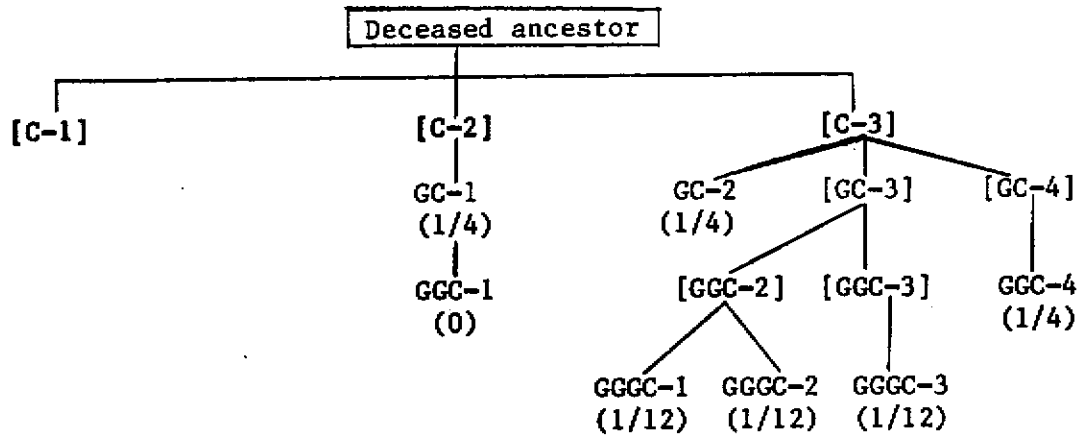
(b) Use of the following words, without more, as applied to issue or descendants is not an expression of contrary intention:

(1) "Per capita" when living members of the designated class are not all of the same generation.

(2) Self-contradictory wording such as "per capita and per stirpes" or "equally and by right of representation."

Comment. Section 250 is new and gives one drafting a will or trust the option of selecting the distribution system provided in Section 240. Section 240 is the distribution system used in case of intestate succession. Under Section 240, if the first generation of issue of the deceased ancestor are themselves all deceased, the initial division of the property is not made at that generation, but is instead made at the first descending generation of issue having at least one living member. See generally Fellows, Simon & Rau, Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States, 1978 Am. B. Found. Research J. 321, 380.

For example, if there have been four generations of descendants of the deceased ancestor but all of the deceased ancestor's children are dead, distribution under Section 240 is made as follows (brackets indicate those who are dead when distribution is made):



If GGGC-3 in the above example were deceased, leaving three surviving children, each of the surviving children would take a 1/36 share.

The language in subdivision (a) that "a will or trust that expresses no contrary intention provides for issue or descendants to take without specifying the manner" is governed by Section 240 continues a provision formerly found in Section 240.

Subdivision (b) provides that certain language is not an expression of a contrary intention sufficient to negate application of Section 250. The wording specified in subdivision (b) is not a clear expression of a contrary intent. See also the Comment to Section 253.

§ 251. Per stirpes or by right of representation

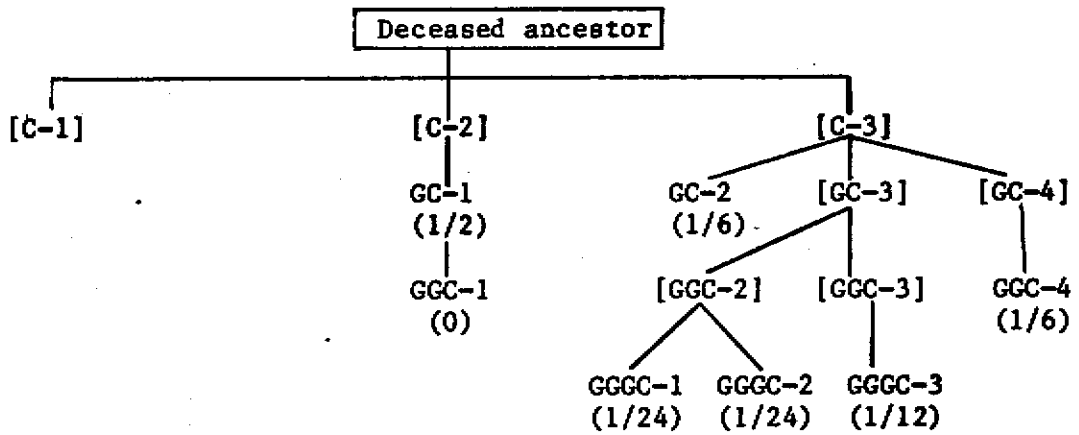
251. (a) When a will or trust calls for property to be distributed or taken "in the manner provided in Section 251 of the Probate Code," the property to be distributed shall be divided into as many equal shares as there are living children of the designated ancestor, if any, and deceased children who leave issue then living. Each living child of the designated ancestor is allocated one share, and the share of each deceased child who leaves issue then living is divided in the same manner.

(b) Unless the will or trust expressly provides otherwise, if a will or trust executed on or after January 1, 1986, calls for property to be distributed or taken "per stirpes," "by representation," or "by right of representation," the property shall be distributed in the manner provided in subdivision (a).

(c) If a will or trust executed before January 1, 1986, calls for property to be distributed or taken "per stirpes," "by representation," or by "right of representation," the property shall be distributed in the manner provided in subdivision (a), absent a contrary intent of the testator or trustor.

Comment. Section 251 is new and gives one drafting a will or trust the option of selecting a pure stirpital representation system. Under such a system, the roots or stocks are determined at the children's generation, whether or not any children are then living. See generally Fellows, Simon & Rau, Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States, 1978 Am. B. Found. Research J. 321, 378-79. See also the discussion in Maud v. Catherwood, 67 Cal. App.2d 636, 155 P.2d 111 (1945).

For example, if there have been four generations of descendants of the deceased ancestor but all of the deceased ancestor's children are dead, distribution under Section 251 is made as follows (brackets indicate those who are are dead when distribution is made):



The terms defined in subdivision (b) are subject to some other definition which may be provided in the instrument. For example, many wills define "by right of representation" to refer to the distribution pattern for intestate succession, rather than to a pure stirpital distribution pattern as under subdivision (a). See, e.g., Johnston, Outright Bequests and Devises, in California Will Drafting §§ 11.42-11.43, at 374 (Cal. Cont. Ed. Bar 1965). In such a case, the definition provided in the instrument will control.

Subdivision (c) supersedes a provision formerly found in Section 240.

405/372/NZ

§ 252. Per capita at each generation

252. (a) When a will or trust calls for property to be distributed or taken "in the manner provided in Section 252 of the Probate Code," the property to be distributed shall be divided into as many equal shares as there are living members of the nearest generation of issue then living and deceased members of that generation who leave issue then living. Each living member of the nearest generation of issue then living is allocated one share, and the remaining shares, if any, are combined and then divided and allocated in the same manner among the remaining issue as if the issue already allocated a share and their descendants were then deceased.

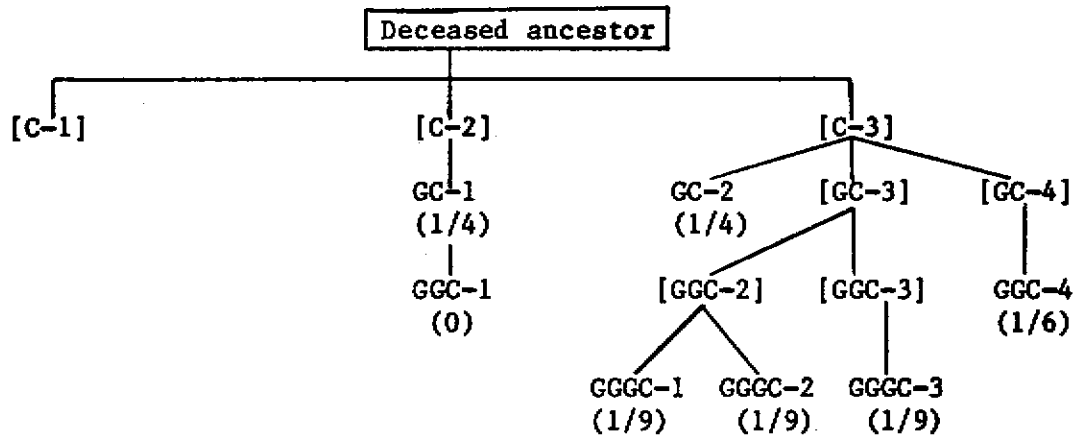
(b) Unless the will or trust expressly provides otherwise, if a will or trust executed on or after January 1, 1986, calls for property to be distributed or taken "per capita at each generation," the property shall be distributed in the manner provided in subdivision (a).

(c) If a will or trust executed before January 1, 1986, calls for property to be distributed or taken "per capita at each generation," the property shall be distributed in the manner provided in subdivision (a), absent a contrary intent of the testator or trustor.

Comment. Section 252 is new and gives one drafting a will or trust the option of selecting the system of per capita at each generation distribution. See generally Waggoner, A Proposed Alternative to the Uniform Probate Code's System for Intestate Distribution Among Descendants, 66 Nw. U.L. Rev. 626, 630-31 (1971); Fellows, Simon & Rau, Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States, 1978 Am. B. Found. Research J. 321, 380-82.

For example, if there have been four generations of descendants of the deceased ancestor but all of the deceased ancestor's children

are dead, distribution under Section 252 is made as follows (brackets indicate those who are dead when distribution is made):



15637

§ 253. Per capita

253. (a) This section applies only when all living members of the designated class are in the same generation.

(b) When a will or trust calls for property to be distributed or taken "in the manner provided in Section 253 of the Probate Code," the property to be distributed shall be divided into as many equal shares as there are living members of the designated class, and each living member of the class is allocated one share.

(c) Unless the will or trust expressly provides otherwise, if a will or trust executed on or after January 1, 1986, calls for property to be distributed among or taken by a class of persons "per capita," the property shall be distributed in the manner provided in subdivision (b).

(d) If a will or trust executed before January 1, 1986, calls for property to be distributed among or taken by a class of persons "per capita," the property shall be distributed in the manner provided in subdivision (b), absent a contrary intent of the testator or trustor.

Comment. Section 253 is new and gives one drafting a will or trust the option of providing per capita distribution to the members of a one-generation class. Per capita distribution is not representation. Thus, with per capita distribution, each member of the designated class takes an equal share in his or her own right, without regard to whether that person's parent or other ancestor is living or dead.

Under subdivision (a), Section 253 applies only where all living members of the designated class are in the same generation. In the context of a multi-generational class, it is not always clear that the term "per capita" is intended to provide a share for a class member whose parent or other ancestor is still living, although the drafter of

the instrument may provide for such a result by appropriately clear language. See also Section 250(b).

An instrument which calls for distribution "per capita with representation" does not invoke Section 253. See generally Waggoner, A Proposed Alternative to the Uniform Probate Code's System for Intestate Distribution Among Descendants, 66 Nw. U.L. Rev. 626, 630 (1971); Fellows, Simon & Rau, Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States, 1978 Am. B. Found. Research J. 321, 380.

Note. The Commission particularly solicits comments on the desirability of this section.

7918

Probate Code § 6147 (technical amendment). Anti-lapse

SEC. 6. Section 6147 of the Probate Code is amended to read:

6147. (a) As used in this section, "devisee" means a devisee who is kindred of the testator or kindred of a surviving, deceased, or former spouse of the testator.

(b) Subject to subdivision (c), if a devisee is dead when the will is executed, or is treated as if he or she predeceased the testator, or fails to survive the testator or until a future time required by the will, the issue of the deceased devisee take in his or her place ~~by representation~~ in the manner provided in Section 240. A devisee under a class gift is a devisee for the purpose of this subdivision unless his or her death occurred before the execution of the will and that fact was known to the testator when the will was executed.

(c) The issue of a deceased devisee do not take in his or her place if the will expresses a contrary intention or a substitute disposition.

Comment. Section 6147 is amended to substitute the reference to Section 240 for the former reference to taking "by representation." This change is nonsubstantive.

969/047

Probate Code § 6402 (technical amendment). Intestate share of heirs other than surviving spouse

SEC. 7. Section 6402 of the Probate Code is amended to read:

6402. Except as provided in Section 6402.5, the part of the intestate estate not passing to the surviving spouse under Section 6401, or the entire intestate estate if there is no surviving spouse, passes as follows:

(a) To the issue of the decedent; if they are all of the same degree of kinship to the decedent they take equally, but if of unequal degree, then those of more remote degree take ~~by representation~~ in the manner provided in Section 240.

(b) If there is no surviving spouse, to the decedent's parent or parents equally.

(c) If there is no surviving issue or parent, to the issue of the parents or either of them, the issue taking equally if they are all of the same degree of kinship to the decedent, but if of unequal degree those of more remote degree take ~~by representation~~ in the manner provided in Section 240.

(d) If there is no surviving issue, parent or issue of a parent, but the decedent is survived by one or more grandparents or issue of grandparents, to the grandparent or grandparents equally, or to the issue of such grandparents if there is no surviving grandparent, the issue taking equally if they are all of the same degree of kinship to the decedent, but if of unequal degree those of more remote degree take ~~by representation~~ in the manner provided in Section 240.

(e) If there is no surviving issue, parent or issue of a parent, grandparent or issue of a grandparent, but the decedent is survived by the issue of a predeceased spouse, to such issue, the issue taking equally if they are all of the same degree of kinship to the predeceased spouse, but if of unequal degree those of more remote degree take ~~by representation~~ in the manner provided in Section 240.

(f) If there is no surviving issue, parent or issue of a parent, grandparent or issue of a grandparent, or issue of a predeceased spouse, but the decedent is survived by next of kin, to the next of kin in equal degree, but when there are two or more collateral kindred in equal degree, but claiming through different ancestors, those who claim through the nearest ancestor shall be preferred to those claiming through an ancestor more remote.

(g) If there is no surviving next of kin of the decedent and no surviving issue of a predeceased spouse of the decedent, but the decedent is survived by the parents of a predeceased spouse or the issue of such parents, to the parent or parents equally, or to the issue of such parents if both are deceased, the issue taking equally if they are all of the same degree of kinship to the predeceased spouse, but if of

unequal degree those of more remote degree take ~~by representation~~ in the manner provided in Section 240.

Comment. Section 6402 is amended to substitute the references to Section 240 for the former references to taking "by representation." This change is nonsubstantive.

34708

Probate Code § 6402.5 (technical amendment). Special rule for portion of decedent's estate attributable to the decedent's predeceased spouse

SEC. 8. Section 6402.5 of the Probate Code is amended to read:

6402.5. (a) If the decedent had a predeceased spouse who died not more than 15 years before the decedent and there is no surviving spouse or issue of the decedent, the portion of the decedent's estate attributable to the decedent's predeceased spouse passes as follows:

(1) If the decedent is survived by issue of the predeceased spouse, to the surviving issue of the predeceased spouse; if they are all of the same degree of kinship to the predeceased spouse they take equally, but if of unequal degree those of more remote degree take ~~by representation~~ in the manner provided in Section 240.

(2) If there is no surviving issue of the predeceased spouse but the decedent is survived by a parent or parents of the predeceased spouse, to the predeceased spouse's surviving parent or parents equally.

(3) If there is no surviving issue or parent of the predeceased spouse but the decedent is survived by issue of a parent of the predeceased spouse, to the surviving issue of the parents of the predeceased spouse or either of them, the issue taking equally if they are all of the same degree of kinship to the predeceased spouse, but if of unequal degree those of more remote degree take ~~by representation~~ in the manner provided in Section 240.

(4) If the decedent is not survived by issue, parent, or issue of a parent of the predeceased spouse, to the next of kin of the decedent in the manner provided in Section 6402.

(5) If the portion of the decedent's estate attributable to the decedent's predeceased spouse would otherwise escheat to the state because there is no kin of the decedent to take under Section 6402, the portion of the decedent's estate attributable to the predeceased spouse passes to the next of kin of the predeceased spouse who shall take in the same manner as the next of kin of the decedent take under Section 6402.

(b) For the purposes of this section, the "portion of the decedent's estate attributable to the decedent's predeceased spouse" means all of the following property in the decedent's estate:

(1) One-half of the community real property in existence at the time of the death of the predeceased spouse.

(2) One-half of any community real property, in existence at the time of death of the predeceased spouse, which was given to the decedent by the predeceased spouse by way of gift, descent, or devise.

(3) That portion of any community real property in which the predeceased spouse had any incident of ownership and which vested in the decedent upon the death of the predeceased spouse by right of survivorship.

Comment. Section 6402.5 is amended to substitute the references to Section 240 for the former reference to taking "by representation." This change is nonsubstantive.